interest of the public to receive live reporting from inside the courtrooms shortly prior and after the trial sessions. To accommodate this interest and at the same time minimize the adverse effects on the trial, the court decided that only one TV team was to be admitted, which would have to make the footage available to other TV stations.

Poland*

This report addresses Poland's laws on competition. These laws generally comprise two categories of regulations: (1) those aimed at combating practices restricting competition, contained in the provisions of the Law of February 24, 1990, on Counteracting Monopolistic Practices;[1] and (2) those aimed at combating unfair competition, contained in the provisions of the Law of April 16, 1993, on Combating Unfair Competition.[2] In addition to these general regulations are incidental norms including certain elements of the law on competition in certain areas, such as the ones contained in the copyright law, the law on inventions, the law on trademarks, and the provisions on competition as set forth in the treaty on Poland's association with the European Union.

I. Counteracting Monopolistic Practices

The key legal regulation creating the foundation for supporting competition in the Polish economy is the Law of February 24, 1990, on Counteracting Monopolistic Practices. For the purposes of the law, monopolistic practices are those that consist primarily of: imposing heavy contractual terms that produce unjustified benefits for economic entities and making the signing of a contract dependent on the other party's acceptance or fulfillment of services that the party would not otherwise accept. Monopolistic practices also include inadmissible personnel and capital concentration, as well monopolistic agreements and the abuse of a dominant position in the market.

A. Dominant and Monopolistic Position

A key legal structure for assessing the effectiveness of antitrust law is the notion of a dominant and monopolistic position of an economic entity introduced

*Prepared by Cezary Banasiński, LL.D., Faculty of Law and Administration, Warsaw University.

1. Law on Counteracting Monopolistic Practices of 1990, Dziennik Ustaw [Dz.U.] No. 89 (1991) (as later amended).

2. Law on Combating Unfair Competition, Dz.U. No. 47, item 211 (1993).

by that law. The term *dominant* refers to a condition in which an economic entity does not encounter any significant competition on the domestic or local market. The law presumes that the dominant entity's share in any one of these markets must be at least 40 percent to indicate a significant edge over rivals. The notion of dominant position is a starting point for an active influence of the state on the structure of entities in the economy. State influence can include control over mergers, formations, and transformations of economic entities, if such structural actions would result in an entity having a dominant position, or if one of the parties forming a new entity already has such a position. Pursuant to the law, the merger, formation, and transformation of economic entities can take place when a competent state body fails within two months to issue a decision banning such actions. The competent state body also has the option of issuing a decision ordering division, or even dissolution, of an economic entity, within the time limit provided if the economic entity has a dominant position and persistently restricts competition or conditions for its creation.

An entity's abuse of the dominant position can manifest itself in: preventing the formation of competition; dividing the market by territory, entities, or products; discriminatorily refusing to sell when there are no other sources of supply or a sale granting privileges to certain entities; and unfair pricing in order to eliminate competition. These types of abuses are regarded as monopolistic practices and are generally banned. A qualified form of the dominant position is the monopolistic position of an economic entity, that is, a condition in which an economic entity encounters no competition on the domestic or local market. Such a condition entails an absolute ban on monopolistic practices in the form of production or sales reduction, or the cessation of sales leading to rising and excessive prices. Ascertaining that price increases result from monopolistic practices provides a basis for issuing decisions on price reductions, the fixing of the so-called undue amount, which is either returned to the buyer or, should the buyer be unknown, paid to the state budget, and an additional penalty accounting for 150 percent of the undue amount paid to the state budget.

Bans applying to monopolistic entities also apply to entities with dominant positions, provided that their market share and practices produce results similar to the results of banned actions by entities with monopolistic positions.

However, the notion of the monopolistic position, useful for theoretical studies, is not unequivocal in practice; lack of competition is a relative category. Decisions of the antitrust Court clearly indicate a narrow interpretation of this notion based on the assumption that the seller's monopolist position means a 100 percent sale of a given commodity in a given market.

B. Concentration in the Economy

Personnel concentration is a monopolistic practice. It consists in combining the functions of managers, board members, or members of audit commissions

in competitive economic entities if the common market share of such entities is higher than 10 percent. Bans apply only to rival entities, but do not include such practices in relation to units acting as subsequent links in the turnover. Not every case of the formation of such a peculiar vertical cartel can be qualified as a banned monopolist practice. A person violating the ban on personnel concentration is subject to being recalled from the position pursuant to the Law of December 23, 1988, on Economic Activity.[3] Economic entities are also entitled to claim compensation for damage resulting from dealing with competitive interests.

Capital concentration, treated by the law as a monopolistic practice, is broadly defined. It consists of acquiring shares or stock, companies, or property of other economic entities, which may cause a significant weakening of competition. The general formulation of this provision makes it possible to identify an increasing number of such situations, an important development in the emerging capital market in Poland.

C. Monopolistic Agreements

For the purposes of antitrust law, monopolistic practices also include: agreements resulting in a direct or indirect fixing of prices and pricing principles between competitors in relations with third persons; dividing markets by territory, product, or entity; determining or limiting the size of production or sales; restricting access to the market or eliminating competitors from the market; as well as agreements resulting in competitors determining the terms of contracts signed with third persons.

Agreements introducing product specialization in goods production or sale, or providing for a joint sale or purchase, can be banned if their aims are contrary to the interests of other economic entities or consumers. If, on the other hand, such agreements lead to significant limitations on competition or hinder its creation in a given market and do not produce economic benefits, bans are mandatory.

D. The Common-Sense Clause

Monopolistic practices are generally banned. If, however, they are detected, a competent state body issues a decision ordering them to cease and determines the conditions for such a cessation. Nevertheless, the antitrust law introduces the so-called common-sense, or flexibility, clause. Under this clause, monopolistic practices, except absolute bans stemming from the monopolistic position, are conditionally banned. Monopolistic practices can be admissible if they are necessary to conduct business activity and do not cause any significant restrictions on competition.

3. Law on Economic Activity, Dz.U. No. 41, item 324 (1988) (as later amended).

E. Antitrust Proceedings

The Antitrust Office is a competent body for matters to counteract monopolistic practices. It is a centralized administrative body subordinate to the Council of Ministers. The Antitrust Office is obliged to monitor the observance of antitrust law, issue decisions on matters shaping the organizational structures of the economy and counteracting monopolistic practices, and define the liability for the application of such practices. The Antitrust Office also registers economic entities with a home market share higher than 80 percent. Proceedings to counteract monopolistic practices can be instituted ex officio or at the request of authorized entities. Those authorized entities include economic entities whose interests have been or could be violated by monopolistic practices, state inspection bodies; consumer organizations within the scope of their statutory activities; or agencies of local government. Should monopolistic practices be ascertained, the Antitrust Office issues a decision banning such practices. The decision can also specify the conditions for such cessation.

Control over the legality of decisions issued by the Antitrust Office is exercised by an Antitrust Court separate from the Court of the City of Warsaw. This court gives a nonprecedential decision on the specific facts of the matter.

II. Unfair Competition

The Law on Combating Unfair Competition of April 16, 1993, replaced the outdated 1926 law of the same name.[4] The work on the draft law was largely based on experience gathered in combating unfair competition in European states with a market economy. The law also takes into account laws binding in the European Union, including Directive No. 84/450 on adjusting Member States' legal provisions on misleading advertising,[5] Directive No. 89/552 on coordinating Member States' specific legal provisions on television,[6] and the Council's proposed directive on comparative advertising and change of Directive No. 84/450.[7]

Representing the interests of the public, entrepreneurs, customers, and especially consumers, the law of April 16, 1993, aims to prevent and combat actions against the fairness of economic turnover. The law broadly defines entrepreneurs as natural or legal persons, or organizational units having no legal status of their own, which, while conducting even incidental earning or professional activity, are taking part in business activity. Thus, the law does not apply to research, or charitable or political activity. Foreign natural or legal persons take advantage

4. Law on Combating Unfair Competition Act, Dz.U. No. 56, item 467 (1930) (*amended by* Law of 1993, Dz.U. No. 47, item 211).

5. Council Directive 84/450, 1984 O.J. (L 250).

6. Council Directive 89/552, 1989 O.J. (L 298).

7. *Cf.* I. Wiszniewska & P. Skubisz, *Methods of Preventing Unfair Advertising, in the Bill on Combating Unfair Competition*, Państwo i Prawo No. 4, 1992.

of the rights arising from the provisions of the law based on international agreements binding Poland, or on the principle of reciprocity.

Pursuant to the law, an act of unfair competition consists of an action contrary to law or good manners, if it threatens or violates the interest of another entrepreneur or customer. Acts of unfair competition specifically include: misleading trademarks; false or deceptive marks on the geographical origin of goods or services; misleading marks on goods or services; disclosing trade secrets; persuading an entity to dissolve or fail to fulfil the agreement with an entity; product imitation; imputations or unfair praise; hampering access to the market; and unfair or banned advertising. The performance of such acts can result in civil or criminal liability.

A. Civil Liability

Pursuant to the law, if an act of unfair competition is committed, the entrepreneur whose interest has been breached can demand that the unlawful action be stopped, that its effects be removed, and that the entrepreneur breaking the law should make a single or multiple declaration of an appropriate content and in an appropriate form. Since the law treats the threatening of interests protected by law as an act of unfair competition, entrepreneurs are also entitled to take actions to ensure no possible future breaches. Such actions can be taken not only by entrepreneurs whose rights have been breached or threatened, but also by national or regional consumer organizations and national or regional organizations whose statutory aim is to protect entrepreneurial interests. Entrepreneurs whose interests have been violated by acts of unfair competition are also entitled to indemnity under the provisions of the civil law for unlawful acts and unjust enrichment. Entrepreneurs may also bring actions for damages resulting from the disclosure of trade secrets. On the motion by a person entitled, the court may also run on the destruction of products, their packaging, advertising materials, and other objects directly connected with the committing of an act of unfair competition.

It is also of great practical significance that temporary rulings may be applied for by a court in whose district an unfair competitor's property is located. As part of its temporary ruling, the court may also ban the sale of specific goods, their introduction into trade, and advertising thereof. The law also protects the other party because if an "obviously groundless" action is brought, the court may order the plaintiff to make a single or multiple declaration of an appropriate content and form making true facts available to the public. If damage results, the defendant may demand redress under the provisions of the civil law.

B. System of Penalties for Acts of Unfair Competition

The law on combating unfair competition provides for few offenses connected with unfair competition. Thus, it gives priority to the protection of the civil law.

What the law terms as prohibited acts are behaviors that are socially dangerous, as determined by the legislature taking account of necessary competition. The system of penalties primarily extends to the disclosure of trade secrets to third persons or their use in the offender's own business activity. Such secrets include technical, technological, commercial, or organizational corporate information where the entrepreneur sought to preserve confidentiality. This approach allows for limited disclosures in the furtherance of economic progress.

Also subject to penalty is the imitation of the trade dress of products or the introduction of an imitated product into circulation, by which the offender creates the possibility of misleading customers as to the identity of the manufacturer or product, thus causing serious damage for the entrepreneur by depriving him of sales. Also punishable is the offense of deliberately marking or failure to mark, despite an obligation to do so, goods and services, which misleads customers as to the origin, amount, quality, ingredients, manufacturing method, usability, applicability, repair, maintenance, or other properties of goods or services, or in hiding the risk involved in the use of objects, through which the offender causes significant damage for the customer. Penalties can also be imposed for disparaging a company, especially its managers, prices, or the company's economic and legal condition. The offender's aim must be to deliberately cause damage to the entrepreneur while at the same time striving to produce material profit or personal gain for himself, his company, or a third person.

Even though the law aims at preventing and combating unfair competition in the public interest, the offenses mentioned in penal regulations can be prosecuted only on the motion of the wronged person. Consumer organizations are allowed to submit demands for prosecution only in cases of a deliberate deception of customers.[8]

C. Specific Provisions on Unfair Competition

The acts of unfair competition referred to in the provisions of the law of April 16, 1993, do not exhaust the notion of a prohibited act as defined in article 3. Thus, the law does not place any restrictions on enforcing claims under such other provisions as the Civil Code, copyright law, patent law, or trademark law; nor does it restrict prosecution under other provisions of the Criminal Code, for example, for imputation or libel. Polish legislation other than the law of April 16, 1993, also has provisions introducing specific bans connected with competition. Such bans mainly refer to advertising and include a total ban on advertising

8. *See* M. Mozgawa, *Petty Offenses Set Forth in the Law on Combating Unfair Competition*, Monitor Prawniczy No. 5, 1994, at 135.

alcoholic beverages[9] and tobacco products,[10] restrictions on foodstuff advertising,[11] and a ban on media advertising for prescription medicines.[12]

III. Conclusions

These attempts to support competition and counteract unfair competition in the Polish economy seem to give grounds for optimism, although it should be realized that the road to the accomplishment of this goal is neither short nor straight. The provisions of the antimonopoly law seem only to go halfway toward becoming a lasting instrument of the state policy creating a market favorable to competition. A fundamental condition for a proper use of this instrument, however, is the working out of a homogeneous policy to support competition, for the question of competition in the Polish economy is still surrounded by ambiguity and even myth.

World experiences indicate that we should be skeptical, and the very character of the Polish economy, which has many oligopolies, also demands prudence. The experience of the Antitrust Office and the Antitrust Court clearly shows that more emphasis should be put on opposing restrictions to competition. Amendments to the law should be aimed at supporting the process of developing competition instead of only focusing on the interests of specific participants of the market (rivals or consumers). The provisions of the antitrust law should create the conditions of self-control over market behavior to a greater extent instead of control over individual behaviors of market participants.

At present, it is too early to assess the provisions on combating unfair competition. These provisions became effective on December 8, 1993, and have not yet been widely reflected in court rulings that would make their practical verification possible. Without doubt, however, the structure of the law is unequivocal, and its contents meet the needs of a contemporary market economy.

9. Law of October 2, 1982, on Up-Bringing in Sobriety and Combating Alcoholism, Dz.U. No. 35, item 230 (1992) (as later amended).

10. Law of June 24, 1953, on Tobacco Growing and Manufacture of Tobacco Products, Dz.U. No. 34, item 144 (1953) (as later amended).

11. Law of November 25, 1970, on Sanitary Conditions for Food and Nutrition, Dz.U. No. 25, item 235 (1970) (as later amended).

12. Law of October 10, 1981, on Pharmaceuticals, Medications, Wholesale Firms and Pharmaceutical Supervision, Dz.U. No. 105, item 452 (1981) (as later amended).